Supreme Court, U.S.
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No. 95-1607

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DAVID L. WILLIS,
Petitioner,

vs.

DEPARTMENT OF PUBLIC SAFETY, STATE OF GEORGIA
COLONEL SID MILES, Commissioner, MAJOR R.C. COLEMAN,
Commanding Officer, CAPTAIN DENNIS SUTTON, Adjutant,
Respondents.

On Petition For Writ Of Certiorari
To The Georgia Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This case involves a Georgia State Patrol officer who became a state employee in 1969. As such, he became a member of the Georgia Employee Retirement System and became subject to the applicable statutes and rules as they existed on that date. In 1984, Georgia amended its constitution to allow the legislature to change any public retirement or pension system in existence prior to January 1, 1985 for the purposes set out in the amendment. The amendment also specifically stated that persons who were members of a public retirement or pension system before January 1, 1985 would be subject to any law enacted under the constitutional amendment. The petitioner was discharged in 1994 under the terms of the statute enacted under this constitutional amendment. The effect of this discharge was to strip the petitioner of his rights which had vested under the Georgia Employee Retirement system.

The questions presented for review therefore are:

1. Is Article 3, Section 10, Paragraph VI of the Georgia Constitution, adopted in 1984, contrary to the impairment of contract clause of Article I, Section X of the United States Constitution as applied to persons hired by the state before that date?

2. Are the provisions of OCGA § 47-2-2 which were enacted after the petitioner's rights under the Georgia Retirement System became vested unconstitutional as applied to the petitioner?

PARTIES TO THE PROCEEDINGS

The names of all parties to this action appear on the cover of the petition.

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CITATION TO CASE BELOW

Department of Public Safety vs. Willis, 218 Ga. App. 541, 462 SE2d 386 (1995)

STATEMENT OF JURISDICTION

The petitioner seeks review of a decision of the Georgia Court of Appeals entered on August 17, 1995. The petitioner filed a Motion For Reconsideration, which the court denied on September 19, 1995. Petitioner then applied for Writ of Certiorari to the Georgia Supreme Court on October 10, 1995. That petition was

denied on January 5, 1996. Petitioner then filed his Motion For Reconsideration, which that court denied on January 26, 1996. The Petition is therefore brought within ninety days of the denial of rehearing by the Supreme Court of Georgia, which is the state court of last resort in this instance. 28 USC § 2101 (c); Supreme Court Rules 13.1 and 13.3.

The Supreme Court of the United States has jurisdiction under the provisions of 28 USC § 2104.

An agency of the State of Georgia and three officers of that agency are parties to this action, and the Attorney General of Georgia is counsel of Record for the respondent. The provisions of 28 USC § 2403 (b) and Rule 29.4 (c) do not apply.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The texts of the following provisions are set out in full in the attached appendix.

Constitution of the State of Georgia Article III, Section 10, Paragraph 6

OCGA § 47-2-1

OCGA § 47-2-2

OCGA § 47-2-3

STATEMENT OF THE CASE

David Willis was hired by the Georgia Department of Public Safety as a state trooper in 1969 and became a member of the Georgia Employee Retirement System.

When he was hired, the definitions of the terms "involuntary separation from employment without prejudice" and "Involuntary separation from employment with prejudice" were the definitions set by the General Assembly in 1968. These are

presently codified at OCGA § 47-2-1 (20) and (21). When Mr. Willis was hired, and thereby entered into his employment contract with the state, these two paragraphs defined the only terms under which an employee could be denied the right to collect a pension that had vested under the Retirement System. App 10.

In 1984, the General Assembly passed legislation intended to redefine involuntary separation from employment, and to add restrictions to an employee's right to qualify for retirement based on involuntary separation. Obviously aware that this new statute would violate the provisions of the Georgia Constitution as it then existed, the legislature made the effectiveness of the act contingent upon the ratification of a constitutional amendment at the 1984 general election. That amendment was passed and became the present Article III, Section X, Paragraph 6. The new legislation was codified at OCGA § 47-2-2, and added provisions to OCGA § 47-2-1.

In 1994, the Department of Public Safety began proceedings to terminate the petitioner's employment for "irresponsible performance of duties and neglect of duty" as defined in OCGA § 47-2-2. The grounds alleged were clearly based on the provisions of the 1984 statute. The petitioner first questioned the statute's constitutionality under the United States Constitution at the very beginning of the hearing before the administrative law judge. App. 8. The hearing officer found that the petitioner should be discharged for neglect of duty as defined by OCGA §47-2-2 (c) (7), and specifically noted that he would be subject to losing his retirement benefits under the provisions of OCGA § 47-2-2 (d). App. 8.

The petitioner appealed this ruling to the Superior Court of Gwinnett County. Judge Ernest H. Woods heard the case and found that the application of the 1984 statute to the petitioner would be unconstitutional under both the United States and

Georgia constitutions. Specifically addressing the 1984 constitutional amendment, Judge Woods wrote,

> Although the current version of OCGA § 47-2-2(d) is based on an act of the legislature which was ratified by a constitutional amendment at the 1984 general election, its application as to pre-1985 members would be unconstitutional as the courts have extended the impairment prohibition to any provisions of a state constitution that would likewise impair such contractual obligations. App. 2.

As the employer's decision specifically stated that the petitioner's discharge would subject his retirement benefits to the sanctions set out in OCGA §47-2-2 (d), the trial court ruled that OCGA § 47-2-2(d) was unconstitutional as applied to the petitioner, and that he was entitled to the involuntary separation retirement benefits provided under OCGA § 47-2-123(c). App. 2

The Department of Public Safety then appealed to the Georgia Court of Appeals. Even though the administrative law judge's decision specifically addressed the pension issue, and in spite of the plain language of the statute providing for judicial review in such matters[1], the Court of Appeals ruled that the trial court did not have the authority to consider the petitioner's entitlement to involuntary separation benefits. App. 1. The Georgia Supreme Court has refused to grant the Writ of Certiorari. App. 5 and 6.

SUMMARY OF ARGUMENT

The contract clause of the United States Constitution (Article I, Section X) limits the power of the several states to abrogate or

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[1] OCGA § 47-2-3 (f) specifically states in part:

> The [reviewing] court may reverse or modify the decision of the employer to discharge the employee if substantial rights of the employee have been prejudiced because the administrative findings, inferences, conclusions, or decision of the employer were:
>
> (1) In violation of constitutional or statutory provisions; . . .

modify contracts. The prohibition against impairing the obligation of contracts is not absolute, but a legislative act which impairs contractual rights will be upheld only if it is both necessary to serve an important public purpose, and is reasonably designed to accomplish that purpose.

When the language of a statute and the circumstances of its enactment demonstrate a legislative intent to create private rights of a contractual nature which are enforceable against the state, that statute will be treated as a contract. Georgia's Supreme Court has consistently held that a statute establishing a retirement plan for governmental employees or officials becomes part of the employee's contract of employment. That same court has held that Georgia's impairment clause prohibits the state from reducing or eliminating any retirement rights granted by such a statute.

Georgia's 1984 statute constituted a drastic retroactive modification of the state's pension contract with its employees. That statute specifically modified the terms under which a state employee could be dismissed and divested of his vested retirement benefits. The state attempted to avoid the effect of the contract clause in its own constitution by adopting a constitutional amendment permitting retroactive modification of the retirement system. However, this Court has held that a provision of a state's constitution may be an unconstitutional impairment of rights.

The petitioner is an aggrieved party and has standing to challenge the Georgia statute. From the very beginning of this action, he has argued that the statute in question and the amendment to the state constitution are unconstitutional. The administrative law judge entered a ruling which specifically addressed the effect of the questioned statute upon the petitioner's rights. The Superior Court of Gwinnett County had the authority to consider the constitutionality of that ruling, and properly found

that the 1984 amendment and the statute implementing it are contrary to the impairment clause of the United States Constitution as applied to the petitioner.

On appeal by the state, the Georgia Court of Appeals ruled that the Superior Court was unauthorized to consider the constitutionality of the amended statute, and that the Superior Court could properly consider his entitlement to retirement benefits. As this decision appears contrary to both the United States Constitution and established Georgia statutory law, the petitioner seeks review of that decision by this court.

ARGUMENT AND CITATION OF AUTHORITIES

Article I, section X, clause 1 of the United States Constitution limits the power of the several states to impair contracts between the state and individuals. To be valid under the constitution, a state act which impairs contractual rights must be reasonable and necessary to accomplish a valid public purpose. *United States Trust Co. v New Jersey*, 431 US 1, 52 LEd 2d 92, 97 S Ct 1505 (1977); *Home Building & Loan Assn. v. Blaisdell*, 290 US 398, 78 LEd 413, 54 S Ct. 231, 88 ALR 1481 (1934).

The petitioner became an employee of the State of Georgia in 1969. When he was hired, the terms under which an employee could be dismissed from service and divested of retirement benefits were established by a statute enacted in 1968. OCGA § 47-2-1 (20) and (21).

It is well established that a state may enter into a contractual relationship with an individual by statute. *Indiana ex rel. Anderson v. Brand*, 303 US 95, 82 LEd 685, 58 S Ct 443, 113 ALR 1482 (1938). Usually, in considering cases like this, the first inquiry is whether the statutes in question in fact constitute a contractual obligation. However, the Georgia Supreme Court has specifically held that a government employee's rights under a statutory retirement plan are a contract between that employee and his employer. See *Withers v. Register*, 246 Ga. 158, 269 SE2d 431 (1980). *Bender v. Anglin*, 207 Ga. 108, 60 SE2d 756 (1950).

In 1984, the General Assembly retroactively imposed additional limitations on an employee's right to qualify for a retirement benefit after an involuntary separation, and redefined involuntary separation itself. OCGA § 47-2-2; 1984 Ga. Laws 1296. There is no question that the 1984 act constitutes a substantial retroactive modification of the statutory contract with Mr. Willis.

Even before the state constitution was amended, the State of Georgia was aware that retroactive application of these new limitations to employees already vested under the retirement system would be unconstitutional under the impairment clause of the federal constitution. See *1983 Op. Att'y. Gen. No. U83-72*. The legislature tried to circumvent the decisions of the state supreme court by amending the state constitution to allow such retroactive modifications. Ga. Constitution, Article III, Section 10, Para. 6. However, this Court has long held that a state constitution is a law within the meaning of the impairment clause, and a state may not avoid the unconstitutional effect of a law by amending the state's constitution. See *Coombes v. Getz*, 285 US 434, 76 LEd 866, 52 S Ct 435 (1932); *Fiske v. Jefferson Police Jury*, 116 US 131, 29 LEd 587, 6 S Ct 329 (1885); See also *1985 Op. Att'y Gen. No. U85-3.*

When the Department of Public Safety tried to dismiss the petitioner under the 1984 statute, he challenged the constitutionality of both the statute and the constitutional amendment. App. 9. The hearing officer's finding and recommendation was based on provisions in the 1984 statute, and clearly addressed the effect of the dismissal on the petitioner's entitlement to pension benefits under the retirement system. App. 8.

Georgia law provides for judicial review of a decision to dismiss an employee discharged under OCGA § 47-2-2. OCGA § 47-2-3. When the petitioner appealed under that statute, his dismissal, its effect upon his retirement benefits, and the constitutionality of the statute's retroactive application to him were properly before the Superior Court. The code specifically authorizes the reviewing court to reverse or modify the decision of the employer if the decision of the employer is in violation of constitutional or provisions. OCGA § 47-2-3 (f) (1). The reviewing court did so in this case, and found that the 1984 statute was unconstitutional as applied to the petitioner.

While it was not surprising that the Department of Public Safety appealed the Superior Court's decision, the decision of the Court of Appeals was unexpected. Its ruling that the Superior Court did not have the authority to consider the constitutional issue is completely contrary to the plain language of OCGA § 47-2-3. It is also contrary to the long established principle that when the constitutionality of a state statute is properly challenged, a state court has a duty to consider the validity of that statute and to hold it void if it violates the federal constitution. *Thomas v. Collins*, 323 US 515, 89 LEd 430, 65 S Ct 315 (1945).

CONCLUSION

Petitioner seeks to review the constitutional validity of Article III, Section X, Paragraph 6 of the Georgia Constitution and OCGA § 47-2-2 as they apply to persons whose benefits under the retirement system vested before their enactment. Although sanctioned by a n amendment to the state constitution, retroactive application of the 1984 statute to those employees whose benefits had already vested is clearly contrary to the impairment clause of the United States Constitution. The Attorney General has stated as much in two separate published opinions. The Georgia Court of Appeals misconstrued a procedural statute to avoid addressing the basic constitutional defect inherent in the . In doing so, it decided an important federal question in a manner which is at odds with those decisions of this court construing the impairment clause of Article I Section X of the Constitution.

Accordingly, the petitioner respectfully prays that the court grant this petition, and that the Writ of Certiorari be GRANTED.

Respectfully submitted,

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